No. 85-782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

LUZ MARINA CARDOZA-FONSECA,
Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION; THE POLITICAL ASYLUM PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA; IMMIGRANT AND REFUGEE RIGHTS PROJECT SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS IN SUPPORT OF RESPONDENT

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July 14, 1986

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INTEREST OF AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. The American Civil Liberties Union Fund of the National Capital Area (ACLU-NCA) is an affiliate of the ACLU and operates the Political Asylum Project. Both the ACLU and the ACLU-NCA have long been actively involved in issues concerning immigration and the rights of aliens. In particular, the Political Asylum Project of the ACLU-NCA is concerned with the interpretation and implementation of the

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* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

Refugee Act of 1980, owing to its representation of aliens seeking political asylum before administrative and judicial bodies.

The Immigration and Refugee Rights Project is a special project of the San Francisco Lawyers' Committee for Urban Affairs. The Lawyers' Committee is the Northern California affiliate of the National Lawyers' Committee for Civil Rights Under Law. The Immigration and Refugee Rights Project is involved extensively in the recruitment and training of attorneys willing to provide pro bono representation to political asylum applicants. The Project is dedicated to ensuring through domestic and international law that the rights of persons seeking asylum are protected.

At issue in this case is the determination of the standard which must

be satisfied by an alien seeking political asylum in order to avoid deportation. The standard adopted by this Court is critical, not only to the longstanding tradition in American jurisprudence of protecting individual liberties from abuse, but particularly to aliens who face severe deprivations of liberty both from deportation itself and from what can and often does occur to them thereafter. Because the ACLU, the Political Asylum Project, and the Immigration and Refugee Rights Project believe the issue here was correctly decided by the United States Court of Appeals for the Ninth Circuit, amici submit this brief in support of respondent and urge affirmance of the judgment below.

SUMMARY OF ARGUMENT

As the briefs of respondent and other amici demonstrate, the intent of the Refugee Act of 1980 was to conform U.S. law to international norms by adopting the internationally recognized "well-founded fear" standard for refugee and asylum determinations. In the event this Court finds the legislative intent regarding the meaning of the "well-founded fear" standard to be unclear, however, the analyses traditionally used by the Court for discerning the appropriate standard of proof in other types of legal proceedings should be applied.

One analysis entails an adjustment of the standard of proof to shift the risk of an erroneous decision away from the party with disproportionately high stakes in the outcome. A second

analysis involves a lowering of the standard of proof to favor the party facing substantial evidentiary difficulties in proving future harm.

Employment of these approaches is appropriate in the asylum context owing to the severe impact that an erroneous denial of asylum would have on the applicant, the increased risk of a wrongful denial caused by cultural, language, and evidentiary barriers, and the practical obstacles to establishing future harm.

Consistent with its prior analyses, the Court should interpret the "well-founded fear" standard to reflect these concerns, by requiring a showing such as a "reasonable possibility" of persecution, or a "good reason" to fear persecution. Accordingly, the Court

should affirm the decision of the Court of Appeals for the Ninth Circuit.

ARGUMENT

I. INTRODUCTION

The Refugee Act of 1980 establishes for the first time a statutory asylum provision for individuals who are unwilling or unable to return to their countries of origin because of "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (1982). In passing this Act, Congress incorporated the internationally-recognized definition of refugee into United States law and extended protection to persons who can prove that their fear of persecution is

"well-founded." In this case, the Court must decide what showing asylum applicants are required to make in order to satisfy this burden.

The Court suggested an answer to this question in Immigration and Naturalization Service v. Stevic, 467 U.S. 407 (1984). While the Court found that applicants for withholding of deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (1982), had to show a "clear probability" of persecution, it suggested that "a more moderate" interpretation of the "well-founded fear" standard used in section 208 asylum proceedings would be:

> "so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that

persecution is a reasonable possibility."

467 U.S. at 424-25 (emphasis supplied). The Government here rejects this "moderate" interpretation and argues that the "well-founded fear" standard for asylum is synonymous with the "clear probability" standard.

As demonstrated by the briefs of respondents and other amici, the language and legislative history of the Refugee Act do not support the Government's position. By codifying the "well-founded fear" standard, Congress did not intend that asylum applicants prove a clear probability of persecution in order to obtain asylum. Rather, it sought to establish a more generous and protective standard, consistent with international norms. Even if the congressional intent were not so explicit, however, and it were necessary for this Court to

ascertain the asylum applicant's proper standard of proof, the end result would be the same and a more protective standard would be required. The focus of this brief is on the analysis the Court should use in the event it finds the legislative intent unclear.

The determination of the proper standard of proof "is the kind of question which has traditionally been left to the judiciary to resolve." Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 284 (1966). When called upon to determine the proper standard of proof, this Court has repeatedly utilized an analytical approach designed to minimize injury to those interests that society deems to be most important. That approach involves both an assessment of the risk of error in the fact-finding process and a

determination of the potential injury to each party from an incorrect determination. In addition, the Court has considered the difficulty of making a particular showing in cases that present significant evidentiary problems. Applying these analytical processes, courts have consistently adjusted the standard of proof to favor the party having the most at stake and the party bearing substantial evidentiary burdens.

As this brief demonstrates, the Court's traditional approach dictates an interpretation of the "well-founded fear" standard that reflects the grave consequences of an erroneous denial of asylum.[1] Unlike the "clear probability"

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[1] In I.N.S. v. Stevic, the Court held that the statutory language (that provided for withholding of deportation under section 243(h) if the applicant "would be subject to persecution") and the relevant legislative history

[Footnote continued on next page]

test urged by the Government, an interpretation such as "reasonable possibility" of persecution or a "good" or "valid reason" to fear persecution takes into account the difficulty of proving that an applicant's fear of persecution is well-founded. The decision of the Ninth Circuit is consistent with this approach and promotes our national commitment, expressed in the Refugee Act, to "welcom[e] homeless refugees to our shores." S. Rep. No. 256, 96th Cong., 1st Sess. 1 (hereinafter "Senate Report to the Refugee Act").

[Footnote continued from previous page] compelled that applicants for withholding show a "clear probability" of persecution. The Court in Stevic consequently was not called upon to assess the risk of error and balance the interests of the parties.

II. THE COURT'S TRADITIONAL APPROACH TO DETERMINING THE PROPER STANDARD OF PROOF DICTATES THAT "WELL-FOUNDED FEAR" BE INTERPRETED TO REQUIRE A "REASONABLE POSSIBILITY" OF PERSECUTION OR A SIMILAR SHOWING

Use of a more protective standard where especially significant interests are in jeopardy is well-accepted. This Court has repeatedly engaged in the type of risk analysis described above when setting the standard of proof absent clear legislative direction. It has employed this analysis over a broad span of time, Schneiderman v. United States, 320 U.S. 118 (1943); Santosky v. Kramer, 455 U.S. 745 (1982), and in a variety of factual contexts, extending from immigration, Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966), to civil commitment, Addington v. Texas, 441 U.S. 418 (1979), to sovereign water rights, Colorado v. New Mexico, 467 U.S. 310 (1984). In some of these cases

the important interests justifying adjustment of the standard of proof have been constitutional in dimension, e.g., Addington, 441 U.S. 418 (1979), while in others they have not, e.g., Nishikawa v. Dulles, 356 U.S. 129 (1958). The same type of analysis that the Court employed in this line of cases is appropriate here.

A. The Interpretation of the "Well-Founded Fear" Standard Should Reflect the Grave Consequences of an Erroneous Denial of Asylum

1. The Standard of Proof Allocates the Risk of Error Based on the Interests Each Party Has at Stake

Factfinding in any judicial or administrative proceeding is imperfect. Errors are inevitable. The standard of proof allocates the risk of such errors between the parties to the proceeding. Justice Harlan explained this function in

his well-known concurrence to In re Winship, 397 U.S. 358 (1970):

> "In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.
>
> "The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent."

397 U.S. at 370-71 (Harlan, J., concurring).

How courts allocate the risk of error in any particular context depends on the impact that a factual error will have on each of the parties and on society as a whole. Choices of the proper standard of proof "reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations." Id. at 370. As Justice Rehnquist has noted, the Court has apportioned the burden of proof "to minimize error as to those interests which we consider to be most important." Santosky v. Kramer, 455 U.S. 745, 786 (1982) (Rehnquist, J., dissenting).

For example, in criminal cases "society imposes almost the entire risk

of error upon itself" because the interests of a criminal defendant "are of sucn magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." Addington v. Texas, 441 U.S. 418, 423-24 (1979). By contrast, the "preponderance of the evidence" standard employed in most civil actions divides "the risk of error in roughly equal fashion" between the parties, id. at 423, reflecting the judgment that a mistaken determination against either is equally undesirable.

This Court has weighed the risks at stake and mandated standards diverging from those distributing the risk of error equally where, as here, the consequences of error would be particularly grievous for one party. In Woodby, the Court considered the significant harm to the

individual of an erroneous deportation in rejecting the government's argument that the Immigration and Naturalization Service need prove deportability only by a "preponderance of the evidence." 385 U.S. at 284-85.[2] The Court emphasized:

> "To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic

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[2] For purposes of risk analysis, the "preponderance of the evidence" standard may be viewed as a functional equivalent of the "clear probability" standard. Both standards require proof that facts are probable, i.e., more likely than not. See I.N.S. v. Stevic, 467 U.S. at 424 (the question presented by the clear probability standard is "whether it is more likely than not that the alien would be subject to persecution"); Black's Law Dictionary (rev. 5th ed. 1979), at 1064 ("preponderance of evidence" is defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not").

> deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."

385 U.S. at 285 (citation omitted) (emphasis added). The Court's recognition that these stakes, which are less substantial than those of asylum applicants, mandated application of a standard more protective than "preponderance of the evidence," was not predicated on the existence of a constitutional right. See Vance v. Terrazas, 444 U.S. 252, 266-67 (1980). Rather, it reflected the Court's balancing of the public and private interests which could be affected by an erroneous finding of deportability.

Applying a similar analysis, the Court in Addington v. Texas, 441 U.S. 418 (1979), rejected a standard of proof that did not adequately protect an individual from the risk of erroneous involuntary commitment for mental illness. The Court first analyzed the interests at stake in such a proceeding. The State, the Court found, had legitimate concerns in providing care for the mentally ill and in protecting the community. Id. at 426. However, in the Court's view, the State had no interest in erroneously confining individuals who were neither mentally ill nor dangerous:

> "Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in

such commitment
proceedings."

Id. at 426.

On the other hand, the individual's stakes were substantial. A person involuntarily committed is deprived of his liberty and indelibly stigmatized as a mental patient. Id. at 425-26. Increasing the State's burden of proof, the Court stated, "is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered." Id. at 427. In the Court's judgment:

> "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater

> than any possible harm to the state."

Id. at 427 (emphasis supplied). Given the risks involved, the preponderance standard did not sufficiently protect the individual. Consequently, the Government's burden was increased.

Most recently, in Santosky v. Kramer, 455 U.S. 745 (1982), this Court overturned a New York statute that empowered the State to terminate parental rights upon the State's showing by a "fair preponderance of the evidence" that the child was "permanently neglected." New York Family Court Act § 622 (McKinney 1975 and Supp. 1981-82). Again applying a risk analysis, the Court adapted the factors outlined in Mathews v. Eldridge, 424 U.S. 319 (1976), for determining the requisites of procedural due process in order to ascertain the appropriate standard of proof. The Court in Mathews

had identified the relevant factors as the individual's interests, the risk of erroneous factfinding adverse to the individual, and the Government's interests. Id. at 335.

The Court first noted that the interests of the natural parents in "the care, custody, and management of their child," 455 U.S. at 753, were "plain beyond the need for multiple citation." Id. at 758, quoting Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981). The Court emphasized that a decision terminating parental rights is "final and irrevocable," 455 U.S. at 759 (emphasis in original); once extinguished, the parents' interests can never be revived.

Second, the Court considered whether the preponderance standard "fairly allocates the risk of an

erroneous factfinding" between the parents and the State. The Court pointed to numerous factors that "combine to magnify the risk of erroneous factfinding" to the parents. Id. at 762. That risk was high, in the Court's view, because of imprecise legal standards, unusual discretion accorded the decisionmaker to rule against the parents, the possibility of cultural or class bias, and unequal litigation resources. Id. at 762-63. When "[c]oupled with a 'fair preponderance of the evidence' standard," the Court found, "these factors create a significant prospect of erroneous termination." Id. at 764. The Court concluded that increasing the burden of proof on the State would diminish the risk of error.

Third, the Court identified two governmental interests: promoting the

welfare of the child and reducing the costs of termination proceedings. Id. at 766. A standard of proof more stringent than the preponderance standard, the Court held, was consistent with the child's welfare and would not impose substantial fiscal or administrative costs on the State. Id. at 766-67.

Given the disproportionate interests at stake and the great danger of factual errors against the parents, the Court rejected the preponderance standard specified in the statute.

Woodby, Addington, and Santosky illustrate this Court's repeated use of a protective standard of proof in order to allocate the risk of an erroneous factual determination away from the party with disproportionately high stakes. The Court has employed this analysis in a long line of cases involving both

constitutional and non-constitutional interests.[3] In the event that the Court considers congressional intent on the meaning of "well-founded fear" to be unclear, this analysis should guide the Court in determining the proper showing by applicants for refugee status.

2. In an Asylum Adjudication, the Applicant's Stakes Outweigh the Government's, and the Risk of an Erroneous Decision Falls Heavily on the Applicant

Application of risk analysis to asylum proceedings can yield but one result: a standard of proof such as

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[3] See, e.g., Colorado v. New Mexico, 467 U.S. 310, 315-16 (1984); Herman & MacLean v. Huddleston, 459 U.S. 375, 387-90 (1983); California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90, 92-93 (1981); Fedorenko v. United States, 449 U.S. 490, 505 (1981); Mullaney v. Wilbur, 421 U.S. 684, 700-02 (1975); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51-52 (1971); Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Schneiderman v. United States, 320 U.S. 118, 139, 158-59 (1943).

reasonable possibility, a standard more protective of asylum applicants than that urged by the Government. The stakes of the individual applicant are substantial, the sources of potential error adverse to her are considerable, and the government's interests are comparatively insignificant. The approach employed by the Ninth Circuit below properly "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Addington, 441 U.S. at 423.

a. The Individual's Stakes

An asylum applicant's stakes in a fair and accurate adjudication of her claim are extremely compelling. The Court has recognized that deportation may involve a "loss . . . of all that makes life worth living," Ng Fung Ho v. White, 259 U.S. 276, 284 (1922), and impose

"drastic deprivations," Woodby, 385 U.S. at 285. A mistaken denial of asylum is even more devastating. It can lead to the loss of life itself, to torture, to imprisonment, to discrimination, or to numerous other forms of persecution. Decisions granting or denying of asylum are unique. As one commentator has noted: "No other adjudication in our legal system potentially subjects the individual to torture or summary execution." Martin, "Due Process and Membership in the National Community: Political Asylum and Beyond," 44 U. Pitt. L. Rev. 165, 190 (1983).

Moreover, an adverse asylum determination, like the termination of parental rights in Santosky, is "final and irrevocable" if affirmed on appeal. Once delivered to her persecutors, the applicant has little hope of escaping to

renew the quest for asylum. The gravity of the applicant's interests thus weighs heavily against applying any standard which would have the applicant and the Government "share the risk of error in roughly equal fashion." Addington, 441 U.S. at 423.

b. The Risk of Error

Applicants for asylum are an especially vulnerable class of litigants. To begin with, the applicant bears the burden of proving to the trier-of-fact that her fear of persecution is indeed well-founded. However "well-founded fear" is construed, the difficulties of meeting this burden and of proving from afar the future actions of a foreign Government or other potential persecutors are formidable. See Section II.B.1., infra.

This burden is compounded by the additional practical difficulties that an applicant faces in documenting her case. Individuals fleeing persecution are often lucky to escape with their lives. As stated by the United Nations High Commissioner for Refugees: "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents . . . ." United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 196 (Geneva 1979) (hereinafter "UNHCR Handbook"). She has no power to subpoena or depose her alleged persecutors; even if she did, "[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of

persecution." Bolanos-Hernandez v. I.N.S., 767 F.2d 1277, 1285 (9th Cir. 1984). As a result, many of the applicant's statements simply may not be susceptible to proof. Often the only evidence she can offer is her personal testimony.

In addition to these problems, many individuals must pursue their asylum claims without benefit of counsel. Cultural, language, and other barriers further increase the risk of a wrongful denial. The United Nations High Commissioner for Refugees has noted:

> "It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign

> country, often in a language not his own.
>
> . . .
>
> "A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-a-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case."
>
> UNHCR Handbook ¶¶ 190, 198.

By contrast, the Government can rely upon the full resources of the I.N.S. at nearly every stage of the proceedings. As this Court found in Santosky v. Kramer, such unequal litigation resources may amplify the risk of errors against the weaker party. 455 U.S. at 763.

In sum, the deck is stacked against the applicant. The chance of an erroneous grant of asylum is minimal,

whereas the chance of an erroneous denial is substantial.

c. The Government's Interests

The Government has several interests in any asylum proceeding: fulfilling our international obligation to shelter refugees from persecution; ensuring accurate asylum determinations; and maintaining the efficiency of the administrative process by minimizing the time and expense of asylum proceedings.

The Government's interests need not conflict with those of the asylum applicant. Just as the Government had no interest in an erroneous involuntary commitment in Addington, it has no interest in erroneously denying asylum to a deserving applicant and returning her to face persecution. To the contrary, the Refugee Act of 1980 embodies a national commitment to protect refugees.

See Senate Report to the Refugee Act, at 1. Since the clear probability standard advocated by the Government would likely increase the erroneous denials of asylum, application of that standard would frustrate the Government's primary interest to "respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, § 101(a).

Furthermore, a standard less than clear probability will not impose greater fiscal and administrative burdens on the Government. Indeed, the Government has made no showing that the more protective standards now applied in several circuits have increased its burdens. The procedures for determining asylum claims are already in place and need not be altered. All that changes is how the fact-finder evaluates the evidence

presented.[4] As this Court recognized in Santosky, modifying the standard of proof "reduce[s] factual error without imposing substantial fiscal burdens upon the State." 455 U.S. at 767 (citations omitted).

[4] See In the Matter of G_____, No. A26306224 (decided December 17, 1985), attached as Appendix A. A review of this decision of an immigration judge reveals the fallacy of the Government's argument that applying two standards to one set of facts is administratively cumbersome. The decision demonstrates that immigration judges are able to differentiate between the two standards and apply each standard separately to the facts presented. As in civil cases which allege several alternative causes of action, or criminal prosecutions which present multiple charges (some of which involve affirmative defenses), the structure of the hearing itself is not altered by the requirement that the finder of fact apply different legal tests simultaneously. Thus, there is no need that the asylum hearing be separate from the hearing in which withholding of deportation relief is considered.

3. The Balance of Interests and the Risk of Error in an Asylum Proceeding Dictate a Showing Such as Reasonable Possibility

In sum, applying the same analysis this Court has employed to allocate the burden of proof in other contexts -- assessing the interests of the applicant and the Government as well as the risk of error in the particular proceeding -- compels the conclusion that the clear probability standard is not appropriate in asylum proceedings. The interests of asylum applicants are momentous. By contrast, an error adverse to the Government would not seriously impair its interests. Given the disproportionate interests at stake, and the high risk of error, it would be completely inappropriate to distribute the risk evenly between the Government and the applicant, or to tilt the scale toward

the Government as the clear probability standard does.

A more protective standard such as reasonable possibility would better reconcile the interests of the parties. It would better reflect the social costs of an erroneous decision. And it would better accommodate the values that Congress and our society as a whole have identified as important. Consistent with its prior decisions, this Court should mandate such a standard in asylum proceedings.

B. The Interpretation of the "Well-Founded Fear" Standard Should Reflect the Difficulty Asylum Applicants Face in Establishing the Possibility of Persecution in the Future

1. This Court and Other Courts Frequently Have Relaxed the Evidentiary Burden on a Party Who Must Establish Future Harm

Future events are less susceptible to proof than those past or present, particularly where a litigant is called upon to predict the future behavior of other persons. The inquiry frequently devolves into a subjective judgment by the trier-of-fact. Consequently, a party bearing the burden of proving that she faces serious future harm has a truly difficult task.

This Court and other courts have recognized this burden and have relaxed the standard of proof where

constitutional or statutory benefits or protections depend upon showing a risk of future harm. The Court in Addington v. Texas, for example, considered the State's burden of showing mental illness and future dangerousness in civil commitment proceedings. While, as noted above, the balance of interests at stake in that case precluded imposition of a preponderance standard (or less) on the State, the Court also found that the difficulties of proof made a reasonable doubt standard wholly impractical. 441 U.S. at 429-30, 432. The Court therefore adopted the intermediate standard of "clear and convincing evidence" to accommodate these evidentiary problems.

The Court in Addington noted that a commitment proceeding differed from a criminal prosecution or a juvenile

delinquency hearing, where "the basic issue is a straightforward factual question -- did the accused commit the act alleged?" Id. at 429. In contrast, facts in a commitment proceeding "represent only the beginning of the inquiry." Id. Whether an individual needs confinement rests on a subjective assessment of the meaning of those facts by expert psychiatrists and psychologists. As the Court noted: "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." Id. at 430. The standard of proof in a commitment proceeding, the Court held, had to reflect these evidentiary obstacles to proving future behavior.[5]

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[5] In Santosky v. Kramer, this Court rejected use of the reasonable doubt

[Footnote continued on next page]

In Ethyl Corporation v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976), the Court of Appeals found it necessary to adjust the standard of proof to allow for the difficulties of predicting future harm. The Court held that the EPA could regulate certain products under a statutory provision covering goods that "will endanger the public health or welfare," even though scientific data revealed only a "significant risk" of harm. Id. at 20. The Court rejected the petitioner's contention that the Act required the EPA

[Footnote continued from previous page] standard of proof in favor of the clear and convincing evidence standard for parental rights termination proceedings. The Court in Santosky held that it was "difficult to prove to a level of absolute certainty" a "lack of parental motive [and] absence of affection," and therefore the Court found it necessary to lower the standard of proof. 455 U.S. at 769.

to establish a probability of injury. Such an overly restrictive standard was unrealistic, given that "[q]uestions involving the environment are particularly prone to uncertainty," and that "speculation, conflicts in evidence, and theoretical extrapolation typify [regulators'] every action." Id. at 24. The Court held:

> "[T]he public health may properly be found endangered both by a lesser risk of a greater harm and by a greater risk of a lesser harm. Danger depends upon the relation between the risk and harm presented by each case, and cannot legitimately be pegged to 'probable' harm, regardless of whether that harm be great or small . . . . [T]hese concepts 'necessarily must apply in a determination of whether any relief should be given in cases of this kind in which

> proof with certainty is impossible.'"

Id. at 18 (citation omitted). Ignoring these evidentiary difficulties would have exposed the public to dangers the statute was designed to prevent.

In Reserve Mining Company v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975) (en banc), the Eighth Circuit employed a similar analysis in interpreting a phrase from the Federal Water Pollution Control Act permitting injunctive relief against pollution hazards which "endanger . . . the health or welfare of persons." Id. at 527. The court construed "endanger" to require a showing of only a "reasonable" or "potential" danger. Id. at 528-29. The court held that since the likelihood of harm to the public health could rarely be shown by more than "acceptable but unproved medical theory," and since the

harm to be avoided -- cancer -- was particularly great, a "reasonable medical concern" justified an injunction under the statute. Id. at 529.

In Halperin v. Central Intelligence Agency, 629 F.2d 144 (D.C. Cir. 1980), the D.C. Circuit recognized that future harm is all the more difficult to predict when it involves the secret actions of a foreign government. In upholding the Government's broad interpretation of one of the national security exemptions to the Freedom of Information Act, which provides for non-production of documents upon a showing that documents "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods," the court explained:

> " . . . any affidavit or other agency statement of threatened harm to national security will

> always be speculative to some extent, in the sense that it describes a potential future harm rather than an actual past harm . . .
>
> In the present case, a stricter standard [than reasonable expectation] for the showing of potential harm could very seldom be satisfied . . ."

Id. at 149 (emphasis added).

Given the covert nature of the harm at issue, the Halperin court also held that it would be unrealistic to ask the Government to prove past instances of concrete harm in order to show a threat of future harm. Requiring a showing of past harm would undermine the very purpose of the statutory exemption, which was "to protect intelligence sources before they are compromised and harmed, not after." Id.

In each of these cases, the court acknowledged the practical obstacles to

establishing a threat of future harm, and reduced the evidentiary burden of the party charged with that obligation. The same approach should apply to asylum proceedings and yield the same result.

2. The Difficulties Applicants for Asylum Face in Establishing the Prospect of Future Persecution Warrants a Showing Such as Reasonable Possibility

Applicants for asylum face the truly onerous burden of proving that they have good reason to fear future persecution. Already saddled with the disabilities noted above -- unequal resources for litigation, inaccessibility of evidence, and cultural barriers -- they nonetheless must predict the actions of a foreign government, or individuals whom the foreign government is unwilling or unable to control. The secrecy that often veils these actions in repressive

regimes renders this task all the more difficult.

A court deciding whether an individual is mentally ill and dangerous at least can hear the testimony of those who have examined the individual. An agency making scientific judgments at least has amassed the raw data that it is called upon to interpret. An individual seeking asylum, however, frequently can present nothing comparable -- no testimony by representatives of the foreign government, no documents identifying her as a victim of future persecution. See Cardoza-Fonseca v. I.N.S., 767 F.2d 1448, 1453 (9th Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986); Carvajal-Munoz v. I.N.S., 743 F.2d 562, 574 (7th Cir. 1984).[6]

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[6] The decision attached as Appendix A vividly demonstrates the evidentiary

[Footnote continued on next page]

Under these circumstances, to require a showing that future persecution is clearly probable is to impose an unrealistic and generally unattainable burden. It will undoubtedly remit to the arms of their oppressors individuals

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[Footnote continued from previous page] difficulties encountered by an asylum applicant in proving his case, and the significantly greater burden imposed by the "clear probability" standard in comparison with the more generous "well-founded fear" standard. In the case attached, the immigration judge found the applicant's detailed testimony regarding his abduction, interrogation, torture, and subsequent surveillance by the Salvadoran police to be consistent and truthful. Applying the "well-founded fear" of persecution standard, the judge granted the applicant asylum. However, in evaluating his claim for withholding of deportation under the stricter "clear probability" standard, the judge found that he had not satisfied his burden of demonstrating that future persecution upon return to El Salvador was "more likely than not." This decision illustrates that proving the likelihood of future persecution is nearly impossible in most situations, and conveys a sense of the substantial dangers faced by an applicant who cannot satisfy the onerous "clear probability" standard.

whose fear of persecution is indeed well-founded, but who cannot demonstrate their likely fate with the requisite certainty. That is not what Congress intended.

III. CONCLUSION

The Refugee Act of 1980 rededicated this nation to "welcom[e] homeless refugees to our shore." Senate Report to the Refugee Act, at 1. The clear probability standard urged by the Government for asylum determinations will deny asylum to deserving applicants and will condemn to persecution innocent people who are bona fide refugees under our law. It is, in sum, a position inconsistent with our international obligations and unworthy of our Government.

For the reasons stated above, the

decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: July 14, 1986

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Phoenix, Arizona

File: A 26 306 224 December 17, 1985

In the Matter of:	)	
	)	
G.	)	IN DEPORTATION
	)	PROCEEDINGS
	)	
Respondent	)	
	)	

CHARGE: SECTION 241(a)(2), Immigration and Nationality Act - Entered without inspection.

APPLICATIONS: Political asylum, withholding of deportation, in the alternative voluntary departure.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Susan R. Giersbach, Esquire	Joseph Ragusa, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

This is a deportation proceeding instituted by the Immigration and Naturalization Service against the above-named respondent pursuant to the

authority contained in Section 242 of the Immigration and Nationality Act. The respondent is a married male alien, a citizen and native of El Salvador, who entered the United States near Lukeville, Arizona on or about April 18, 1985.

On or about April 19, 1985 he was served with an Order to Show Cause charging that he was subject to deportation pursuant to Section 241(a)(2) of the Immigration and Nationality Act in that he entered the United States without being inspected.

On or about July 22, 1985 respondent admitted the truth of the factual allegations contained in the Order to Show Cause, conceded deportability on the charge set forth and declined to designate a country of deportation and consequently El Salvador was directed.

Based upon the respondent's admissions, I conclude that he is deportable as charged in the Order to Show Cause.

Respondent has applied for relief from deportation in the form of political asylum, withholding of deportation and, in the alternative, voluntary departure.

In order to qualify for political asylum, there must be a showing that the respondent meets the statutory definition of refugee in Section 101(a)(42)(A) of the Act, that is, a person who is unable to unwilling to return to and is unable or unwilling to avail him or herself of protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

The burden is upon the respondent to show that he will be persecuted or to show a well-founded fear of persecution in El Salvador on account of the above-mentioned factors.

Respondent must demonstrate his well-founded fear of persecution is more than conclusionary statements.

Respondent submitted his asylum application on Form I-589. This application was referred to the Department of State for an advisory opinion. The Department advised that the respondent had not established a well-founded fear of persecution in El Salvador.

Respondent's asylum application must be considered simultaneously as an application for withholding of deportation to El Salvador.
Section 243(h) of the Act provides that

an alien cannot be deported to a country if such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion. To qualify for withholding a respondent must prove a clear probability that his life or freedom would be threatened in El Salvador on account of the above-mentioned factors.

The Ninth Circuit Court of Appeals law is binding upon this Court in this particular jurisdiction and some of the cases that have been instructive on the burden in establishing a well-founded fear of persecution include Bolanos-Hernandez v. INS, 749 F.2d 1316. The 9th Circuit held that the well-founded fear test is a more liberal test than the clear probability test under Section 243(h) of the Act. However, the

Court indicated that mere assertions of fears and generalized conditions are insufficient to establish the well-founded fear of persecution. However, an evaluation of whether an alien has a well-founded fear includes consideration of the alien's state of mind as well as general conditions in the country and the experience of others. The Court has held that there is no requirement to corroborate specific threats of persecution. The Court noted in this regard that it is difficult for aliens fleeing from persecution to corroborate testimony through documents and witnesses. Respondent must establish more than threats to establish a well-founded fear of persecution. Respondent must be able to establish that there is reason to take the threats seriously and that those making the threats have the

ability and will to carry out those threats. See also Argueta v. INS, 759 F.2d 1396 and Cardoza-Fonseca v. INS.

The facts in this case reflect the following: Respondent is a 28 year old married male alien, citizen and native of El Salvador. His wife preceded him in entering the United States in January of 1985. He has three children who are currently residing in his hometown in El Salvador with his mother-in-law. Respondent was employed for approximately four years prior to his arrival in the United States as a traveling shoe salesman. He bought and resold shoes and worked the towns surrounding his hometown of Sensuntepeque.

Initially, it is appropriate to comment on respondent's credibility in this case since, with respect to specific factors, his is the only testimony

concerning his claims for asylum and withholding. It is my observation that respondent testified in a straightforward and honest manner, his demeanor demonstrated to me that he was telling the truth. In my view his testimony is internally consistent. He answered with great specificity concerning the events surrounding his detention, beatings and interrogation. Upon being questions on cross-examination he answered in a quick and honest manner, admitting some things that may have been to his detriment without hesitation. And while there appears to be minor inconsistencies between respondent's application for political asylum and his testimony, I credit his oral testimony particularly with respect to item number 29 in the application for asylum which indicates

that he had permission to leave the country.

Respondent testified that in December of 1984, the date he does not recall specifically, but it was a Saturday, two detectives came to his house at approximately 6:30 p.m. They asked for his name and showed him an identification card which had some initials on it and had the photograph of the detective on it. The detectives directed respondent to accompany him. They were dressed as civilians but respondent testified that they were armed. Respondent indicated he was taken to a car which he identified as a police car. He identified it as a police car from having observed it on prior occasions at the police station. Two additional men were waiting for respondent in the automobile. They

directed him to get into the car and the three sat with him. Two blocks down the street from his house the detectives directed respondent to lay on the floor. Respondent objected and as a result he was pushed onto the floor. The detectives handcuffed him with his hands behind him and as they got near the station put a blindfold on respondent. Respondent specifically testified that it was a green handkerchief. Respondent was taken to a small room at police headquarters where he was placed on a chair. Respondent described the room in some detail on cross-examination. He described the room has have linoleum tile floors, no windows, and a bare lightbulb in the ceiling. The detectives next took respondent's billfold from his pocket, lifted his blindfold somewhat and indicated he had quite a bit of money.

They began to question respondent. They asked who his guerrilla leader was, what his guerrilla nickname was, and how many confrontations he had been at. Respondent testified that he was mistreated while undergoing interrogation. This mistreatment took the form of being hit with closed fists in both the stomach and head and being required to do deep knee bends while blindfolded and handcuffed, virtually continuously from the time he was brought into the police station on Saturday evening until eleven P.M. on Monday evening. While doing deep knee bends the respondent was hit repeatedly and asked the questions alluded to above. He was told to do the deep knee bends until he told the truth. He indicated that from exhaustion he fell on the floor but was picked up by the hair or kicked by the

police in order to continue doing the deep knee bends. Respondent testified that he denied knowing anything concerning what the police were asking him. During the detention until eleven P.M. respondent was not permitted to sleep, eat or use the bathroom. At eleven P.M. on Monday night, respondent was taken from the detention location where he was interrogated and beaten to a nearby police station. Respondent testified he had no idea he was going to the police station, but rather, his interrogators threatened to kill him. In this regard, a pistol was placed on his neck, he was picked up by the arms, and taken to a car. Respondent testified he was picked up in this manner because he could no longer stand. Upon being transferred to the automobile, respondent testified that he tried to get away. He

said one of the detectives threw him into the car and at this point he hit his head. Upon arriving at the police station, respondent was asked if he wanted to go to the bathroom by a policeman. This policeman was not one of the four individuals who had originally picked the respondent up and interrogated him. At this point, respondent was taken to the bathroom and was told to take his blindfold off. Respondent spent from approximately eleven P.M. on Monday night until the next Saturday in custody at the police station. He testified he was still handcuffed and blindfolded but at this point his hands were handcuffed in front of him rather than behind him. Respondent testified that the detectives who had originally arrested him came to the police station and continued to ask him the same questions he had been asked

earlier concerning guerrilla activities. He was repeatedly asked to sign papers. Respondent testified he does not know what those papers said nor did he ask what they said. He did not know what they said because they were covered by a sheet of white paper. Respondent testified he signed approximately five papers and each time he signed something the interrogators laughed. Respondent testified that it was not until Tuesday afternoon that he was able to walk holding on to things because of the treatment he had received earlier. His blindfold was taken off for the first time on Wednesday night. Respondent testified that it was taken off in the evening because of the police concern that his eyes might be damaged if the blindfold was taken off during the day. Respondent testified he was released at

approximately four P.M. the following Saturday. He testified that a lieutenant told him that he should not get involved in those things because it was dangerous. Respondent testified that he believed he was told this because the police were suspicious that he was involved in guerrilla activities. At no time was respondent either told why he was arrested nor why he was released. While in the police station, the respondent was fed. He slept in a hallway with a police guard on a cement floor. Upon respondent's release his wrists were raw from the handcuffs.

Upon respondent's release he went to his house where his wife indicated that his family had done everything possible to get him released by the police and authcrities said that they had no knowledge of where respondent was

located. Approximately 15 days after he was released respondent testified he began to observe a policeman in plain clothes watching the respondent. Respondent testified he knew this policeman's face and had been told by his brother that this individual was a plainclothes policeman. Respondent testified that he saw this individual approximately three times per week watching him at the private house where only his family bought water and at a bus stop. Respondent testified he rarely saw this individual prior to his arrest in December of 1984.

Respondent testified further that after his arrest he began to alter his behavior. In this regard he testified that he began sleeping in different places. These places included his

mother's house, his sister's house, and his mother-in-law's house.

In early January, 1985 while on a selling expedition in San Luis Potosi, approximately 70 kilometers from his home, respondent was stopped by guerrillas along with other individuals at a roadblock. Respondent testified that all of the goods belonging to the travelers were taken by the guerrillas. The guerrillas indicated that they had broadcast a warning on their clandestine radio station that there would be a stoppage of all transportation on that particular day. Respondent testified that he was not threatened in any manner by the guerrillas.

Respondent departed from El Salvador on April 8, 1985. He testified that he did not obtain a passport to leave the country. Concerning permission

to exit the country, respondent testified that the bus driver of the bus he was traveling in would take a list of the passengers to the authorities and then the bus would be permitted to travel from El Salvador into Guatemala. Respondent testified that he crossed a river to go from Guatemala to Mexico. Respondent testified that he did not ask for political asylum in either Guatemala or Mexico nor did he request political asylum from the American Consulate. Respondent testified he did not learn of political asylum until his first hearing before Immigration Judge Nail on July 16, 1985.

One of the crucial issues in my view in this case concerns the amount of time between respondent's initial arrest in December of 1984 and the period of time until his departure on April 8 of

1985. The Government would argue that respondent's delay in departing should lead to an inference that respondent did not fear persecution. The Government would further contend that respondent's motivation in leaving El Salvador was primarily economic rather than fear of political persecution. Respondent's wife had already traveled to the United States primarily for economic reasons after respondent's shoe business, which respondent's wife worked, failed as a result of the guerrilla seizure of his goods.

While economics may indeed have been a factor in respondent's decision to leave El Salvador and come to the United States, in my view the evidence does not mandate a finding that that was the only or primary reason for respondent's departure. As I have noted before, I

credit respondent's testimony in this case. In December of 1984 he was arrested, accused of guerrilla activities and severely mistreated in order to get him to confess to engaging in guerrilla activities. While respondent's mistreatment in a severe manner ceased after he was remanded to the custody of the police, respondent was further interrogated concerning guerrilla activity, was maintained in police custody and handcuffs and was directed to sign papers. Now we have no idea what those papers were. Respondent has testified that he could not see what was written on those papers. However, I think a reasonable inference can be drawn that whatever was on those papers was not something that was of benefit to respondent.

Had the matter ended at this point, particularly in view of no further interrogations or arrests by respondent, I think a good argument could be made that there was no reason to fear anything further on the part of the police. However, the matter did not end at this point. In this regard, respondent has credibly testified that he was being observed by a policeman approximately three times per week in various places. Respondent testified that prior to his arrest that he had not observed this individual but on rare occasion. In view of respondent's arrest, interrogation and beatings, I think a reasonable inference can be drawn that he was continually observed by the police who initially arrested him.

Based upon the above, I conclude that respondent has established a well-

founded fear of persecution based upon what the government perceived to be his activities on behalf of the guerrillas. Whether respondent in fact engaged in guerrilla activities or not is immaterial. It appears that the government believed he was so engaged.

With respect to respondent's application for withholding of deportation, the burden there is much greater. Both the 9th Circuit and the Board of Immigration Appeals require that fear of persecution be established by a clear probability, that is, that it be more likely than not that one be persecuted upon their return to El Salvadcr as a result of race, religion, nationality, membership in a particular social group or political opinion. I cannot say that respondent has satisfied that particular burden. I believe that

that is a much higher standard of proof and I find, based upon the above factors, that respondent did not satisfy that burden of proof.

With respect to respondent's application for voluntary departure, should the Board of Immigration Appeals reverse my decision on the application for political asylum, I find that respondent is eligible for voluntary departure in that he established himself to be a person of good moral character and is willing to obey any orders of this Court and has sufficient funds with which to pay for his trip to El Salvador.

ORDER: IT IS ORDERED that respondent's application for political asylum be granted and that his application for withholding of deportation be denied, and that his application for voluntary departure

should be granted in whatever amount of time the Board of Immigration Appeals should direct.

s/JOHN J. McCARRICK
Immigration Judge